

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

DAR No. _____

Suffolk, ss.

Appeals Court No. 2021-P-0820

KATHERINE ARMSTRONG, *et al.*, *Plaintiffs/Appellees*

v.

KATHLEEN THEOHARIDES, *et al.*, *Defendants/Appellants*
(and a companion case)¹

On Issues Reported from Superior Court Civil Action
Nos. 1884-CV-02132 and 1884-CV-02144

Application for Direct Appellate Review

Maura Healey, *Attorney General*

Kate R. Cook (BBO# 650698)
cook@sugarmanrogers.com
Special Assistant Attorney General

C. Dylan Sanders (BBO# 630668)
sanders@sugarmanrogers.com

Lisa C. Goodheart (BBO# 552755)
goodheart@sugarmanrogers.com

Alessandra Wingerter (BBO# 698391)
wingerter@sugarmanrogers.com

SUGARMAN, ROGERS, BARSHAK & COHEN, P.C.
101 Merrimac Street, Suite 900
Boston, MA 02114
(617) 227-3030

Attorneys for Appellants
Secretary Kathleen Theoharides and Commissioner Martin Suuberg

¹ Conservation Law Foundation, *et al.*, v. Kathleen Theoharides, *et al.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW	1
STATEMENT OF PRIOR PROCEEDINGS	3
REGULATORY FRAMEWORK	7
A. The Licensing Provisions in the Waterways Regulations.....	8
B. The Municipal Harbor Plan Regulations: 301 CMR 23.00.	10
STATEMENT OF FACTS RELEVANT TO THE APPEAL.....	12
STATEMENT OF THE ISSUES OF LAW RAISED BY THE APPEAL	14
BRIEF STATEMENT OF THE STATE DEFENDANTS’ ARGUMENT	15
I. DEP Has Authority Under Chapter 91 To Apply Secretary- Approved Harbor-Specific Standards Developed In The MHP Planning Process When Making Chapter 91 License Determinations For Projects Within The Pertinent Waterfront Area.....	15
A. The Provisions In The Waterways Regulations Requiring DEP To Apply Substitute Harbor-Specific Standards Are A Proper Exercise Of DEP’s Broad Authority To Adopt Regulations Under Chapter 91.	15
B. As The Executive Designated By The Legislature As “The Administrator Of Tidelands,” And As The Head of the Commonwealth’s Primary Environmental Planning Agency, The Secretary Is Authorized To Approve The Harbor-Specific Standards For Nonwater-Dependent Projects Used By DEP In Making Licensing Determinations In Areas Subject To An MHP.	18

C.	DEP Has Not Improperly Delegated Its Chapter 91, § 18 Licensing Authority To EEA.	21
II.	The Superior Court Correctly Dismissed CLF’s Challenge To The Secretary’s Approval Of The DW MHP, Because CLF Lacks Standing To Make Such A Challenge.....	22
	WHY DIRECT APPELLATE REVIEW IS APPROPRIATE.....	22
	CERTIFICATE OF COMPLIANCE.....	26
	CERTIFICATE OF SERVICE	27
	ADDENDUM	28

TABLE OF AUTHORITIES

CASES

<i>Enos v. Secretary of Env'tl. Affairs</i> , 432 Mass. 132 (2000)	22
<i>Entergy Nuclear Generation Co. v. Department of Env'tl. Protection</i> , 459 Mass. 319 (2011)	18
<i>Hertz v. Secretary of Exec. Office of Energy & Env'tl. Affairs</i> , 73 Mass. App. Ct. 770 (2009)	22
<i>Moot v. Department of Env'tl. Protection</i> , 446 Mass. 340 (2007)	16

STATUTES

G.L. c. 21A, § 14.....	7
G.L. c. 21A, § 2.....	7
G.L. c. 21A, § 4.....	7, 20, 21
G.L. c. 21A, § 4A.....	7
G.L. c. 21A, § 8.....	7
G.L. c. 30A.....	5
G.L. c. 91, § 18.....	<i>passim</i>
G.L. c. 91, § 18B	4, 19
G.L. c. 91, § 2.....	16

RULES

Mass. R. App. P. 11(a).....	23
Mass. R. Civ. P. 64.....	15

REGULATIONS

301 CMR 23.00, <i>et seq.</i>	2, 4, 7, 14
301 CMR 23.01	8, 10
301 CMR 23.02.....	11
301 CMR 23.05.....	11, 17, 18
310 CMR 9.00, <i>et seq.</i>	<i>passim</i>
310 CMR 9.02.....	9
310 CMR 9.14.....	19, 21
310 CMR 9.31	8, 9, 10
310 CMR 9.33.....	9
310 CMR 9.34.....	9, 10
310 CMR 9.35.....	9, 17

310 CMR 9.36.....	9
310 CMR 9.51.....	9, 10, 11, 17
310 CMR 9.52.....	10, 11, 17
310 CMR 9.53.....	10, 11
310 CMR 9.54.....	9

INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW

As the Commonwealth prepares for the impacts of climate change – including rising sea levels, increased flooding, and more frequent storms of greater intensity – a decision of the Superior Court has called into question the thirty-year-old regulatory scheme under which waterfront development in many urban areas is carefully planned and individual projects are then licensed, and by which the public’s interests in tidelands is protected and administered. Because of the critical importance of this well-established regulatory scheme for the Commonwealth’s waterfront planning, and the far-reaching impacts of the Superior Court’s decision, including on many Chapter 91 licenses issued over the past thirty years, appellants Kathleen Theoharides, in her capacity as Secretary of the Executive Office of Energy and Environmental Affairs (“Secretary” of “EEA”), and Martin Suuberg, in his capacity as Commissioner of the Department of Environmental Protection (“Commissioner” of “DEP”) (together, “State Defendants”), ask this Court to grant direct appellate review of the two issues that have been reported for determination in these appeals, and to affirm the validity of the tidelands regulatory framework at issue.

One of the two issues reported to the Appeals Court is a significant question of first impression and substantial public interest, which directly impacts current and future tidelands planning and licensing of individual uses in tidelands, as well

as the validity of many existing licenses issued under this regulatory framework: Does DEP, when making licensing determinations under G.L. c. 91, § 18 for certain projects in areas subject to a municipal harbor plan (“MHP”), have the authority to apply standards specific to that harbor area which have been approved by the Secretary under a companion set of regulations at 301 CMR 23.00, *et seq.* (the “MHP Regulations”), rather than generic standards of general applicability found in 310 CMR 9.00, *et seq.* (the “Waterways Regulations”)?

The resolution of this question will impact (1) 17 existing municipal harbor plans in 12 communities, including MHPs in Boston, Quincy, New Bedford, Gloucester, Salem, Lynn, Edgartown and Provincetown, among other communities; (2) over 50 current Chapter 91 licenses for existing uses within those 17 MHPs; (3) pending applications for Chapter 91 licenses for projects in areas subject to the 17 MHPs; and (4) future applications for Chapter 91 licenses for projects in the existing MHPs. The Superior Court’s decision has thrown into doubt a regulatory scheme – twice submitted to the Legislature for review without subsequent legislative action or objection – that is carefully calibrated to preserve and protect the public’s rights in tidelands while accommodating local land-use planning objectives specific to particular waterfront areas, instead of imposing a “one size fits all” set of generic standards to every waterfront in the Commonwealth. Direct appellate review is appropriate to expeditiously confirm

the validity of this regulatory scheme and restore confidence in state and local waterfront planning in municipal areas.²

STATEMENT OF PRIOR PROCEEDINGS

The issues reported to the Appeals Court arise from two Superior Court actions challenging Boston's Downtown Waterfront Municipal Harbor Plan ("DW MHP"), although the Superior Court's reasoning and declaration of law directly impact all MHPs in the Commonwealth.³ One of five approved harbor plans in Boston, the DW MHP covers 42.1 acres and 26 parcels along the Boston waterfront from and including Long Wharf to Seaport Boulevard, including the New England Aquarium (on Central Wharf), Long Wharf, and Rowes Wharf. Addendum at 111, 115-17. The DW MHP establishes planning standards and limitations for the future development of two parcels: the "Harbor Garage" site and the "Hook Wharf" site. Addendum at 111.

As discussed below, when DEP reviews applications for Chapter 91 licenses for nonwater-dependent projects in an area covered by an MHP, the Waterways

² The Superior Court reported a second issue which the State Defendants do not believe is an issue of first impression or of substantial public importance: Do the CLF appellees have standing to challenge the City of Boston's Downtown Waterfront Municipal Harbor Plan, the particular MHP at issue in these actions? While this second issue on its own would not warrant direct appellate review, the issue was reported to the Appeals Court in tandem with the first issue and should be decided at the same time for reasons of judicial economy.

³ Prior to being jointly reported to the Appeals Court, the two actions were treated as related and proceeded in tandem through the Superior Court.

Regulations require DEP to use any substitute numerical and use standards that may have been specified in that MHP for that particular harbor area, rather than the otherwise-applicable generic standards, in determining whether the project “serve[s] a proper public purpose,” as required by G.L. c. 91, § 18. Each MHP is the product of an extensive, joint local and state planning exercise overseen by the Office of Coastal Zone Management (“CZM”) under 301 CMR 23.00 , a process in which DEP is a required and critical participant. MHPs become effective upon approval by the Secretary, who oversees both DEP and CZM and who has been expressly designated by the Legislature as “*the* administrator of tidelands.” *See* G.L. c. 91, § 18B (emphasis supplied).

Following a five-year planning process, the DW MHP was approved by the Secretary – with DEP’s express concurrence – on April 30, 2018. Addendum at 110. Thereafter, the Conservation Law Foundation and thirteen individuals (together, “CLF”) commenced an action seeking, among other relief, a declaratory judgment that certain provisions of the Waterways Regulations are *ultra vires*. Specifically, CLF asserted that it is impermissible for the Waterways Regulations to allow DEP to apply the harbor-specific MHP standards when making license determinations for projects in areas subject to an MHP, simply because the MHP’s numerical and use standards were developed by a municipality and approved by the Secretary and not established exclusively by DEP itself. CLF also asserted that

the DW MHP constituted “illegal rule making” by EEA because the harbor plan was not promulgated pursuant to the Administrative Procedures Act, G.L. c. 30A.

In a separate action, residents of the Harbor Towers condominium filed suit against DEP, EEA, and RHDC 70 East India LLC, the owner and proponent of a proposed redevelopment of the Harbor Garage parcel within the DW MHP. The Harbor Tower plaintiffs, who reside in two 400-foot-high condominium buildings adjacent to the Harbor Garage site, initially challenged the merits of the DW MHP and, in particular, the plan’s specific numerical and use standards for any future Chapter 91 licensed use of the Harbor Garage site. The Harbor Tower plaintiffs later amended their complaint to add a count that, mimicking CLF’s complaint, generally challenged DEP’s authority to rely on standards developed by a municipality and approved by the Secretary, rather than on the generic standards set forth in the Waterways Regulations.

These actions were the subject of two rounds of coordinated dispositive motion practice. On October 17, 2019, the Superior Court issued a written decision and order dismissing most of the counts in both actions. Addendum at 40. Pertinent to this application for direct appellate review, the Superior Court granted the State Defendants’ motion to dismiss Count II of CLF’s complaint, which sought a declaratory judgment that the DW MHP constituted “illegal rulemaking,” on the

ground that CLF lacks standing to challenge the DW MHP. Addendum at 72-74, 76.

On April 1, 2021, the Superior Court issued another written decision and order, following cross-motions for partial summary judgment brought by all parties. *See* Addendum at 77. Pertinent to this application, the Superior Court granted summary judgment to CLF on Count I of CLF's amended complaint, and to the Harbor Tower plaintiffs on Count IX of their amended complaint (which mirrored Count I of CLF's complaint), and ordered the following:

A declaration shall enter declaring that: [DEP]'s delegation of its core powers under G.L. c. 91, § 18, to the Secretary of Energy and Environmental Affairs through the municipal harbor plan regulations is *ultra vires* and beyond the Department's authority. The Secretary is not authorized by the Legislature to make substitute proper public purpose and public benefit determinations for use in [DEP]'s licensing of Tidelands projects within the Downtown Waterfront District Municipal Harbor Plan. The provisions of the Secretary's Decision on the Downtown Waterfront District Municipal Harbor Plan that purport to do so are null and void.

Addendum at 104-05.

On June 23, 2021, the Superior Court granted motions to report for appellate determination (1) the trial court's decision on Count I of CLF's amended complaint and Count IX of the Harbor Towers amended complaint, which found certain portions of the Waterways Regulations *ultra vires* and the Secretary's Decision null and void, and (2) the trial court's decision on Count II of CLF's

amended complaint, which found that the CLF plaintiffs lacked standing to challenge the DW MHP. *See* Addendum p. 106.

REGULATORY FRAMEWORK

To appreciate why direct appellate review is appropriate, it is necessary to consider the pertinent regulatory framework that has governed municipal waterfront planning and licensing for three decades.

In 1990, DEP and EEA promulgated companion sets of regulations that established a coordinated program for the planning, administration and licensing of tidelands. The Waterways Regulations, 310 CMR 9.00, *et seq.*, were adopted by DEP pursuant to its authority under c. 91, § 18, as well as pursuant to G.L. c. 21A, §§ 2, 4, 8 and 14, and include criteria for, among other things, how DEP would make licensing decisions and determinations for nonwater-dependent uses on tidelands. The MHP Regulations, 301 CMR 23.00, *et seq.*, were promulgated simultaneously by EEA, likewise pursuant to c. 21A, §§ 2 and 4, and additionally under c. 21A, § 4A, to allow municipalities to prepare and propose MHPs that, once approved by the Secretary, will “inform and guide state agency actions affecting the implementation of waterway management programs at the local level,” and “will be of direct assistance to [DEP] in making regulatory decisions pursuant to [c. 91] that are responsive to municipal objectives and priorities,

harbor-specific conditions, and other local and regional circumstances.” 301 CMR 23.01(2).

As described in more detail below, these companion regulations fit together and realize one of the primary purposes of the Executive Office: ensuring coordination among its various departments and offices. Tidelands are, by their nature, frequently on the coast. The Secretary as the administrator of tidelands and cabinet level official responsible for both DEP and CZM is uniquely positioned to ensure that DEP’s waterways program and CZM’s municipal harbor planning program work in concert with each other.

A. The Licensing Provisions in the Waterways Regulations.

Under Chapter 91, § 18, DEP may license a nonwater-dependent use of tidelands only after making a determination that the use “serve[s] a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands.” The legislature did not define how DEP must make these determinations, but rather granted DEP broad discretion to establish standards to guide its implementation of c. 91 § 18. In the exercise of that discretion, DEP created a regulatory framework with numerous quantitative and qualitative criteria. The “basic requirements” for licensing are listed at 310 CMR 9.31(1), which cross-references the provisions at 310 CMR 9.32 to 9.40 that contain standards for a wide range of matters, including environmental

compliance (9.33), conformance with an approved MHP (9.34), preservation of water-related public rights (9.35), and protection of water-dependent uses (9.36).

The licensing process differs based on whether a project is water dependent and on whether it is located on private or Commonwealth tidelands. DEP may issue a license for a water-dependent project located entirely on Private Tidelands (defined at 310 CMR 9.02) that simply meets all the basic requirements. *See* 310 CMR 9.31(2). However, in order to license a water-dependent project located on Commonwealth Tidelands (defined at 310 CMR 9.02) or a nonwater-dependent project on any tidelands, DEP also must determine that the project serves a proper public purpose. *Id.* and G.L. c. 91, § 18. The regulations provide a rebuttable presumption that water-dependent projects serve a proper public purpose, provided that it also complies with the basic standards. 310 CMR 9.31(2)(a). By contrast, for nonwater-dependent projects, the regulations provide a rebuttable presumption that the project serves a proper public purpose only if the project complies not only with the basic requirements, but also with the extensive qualitative and quantitative criteria in 310 CMR 9.51 through 9.54 for conserving and accommodating water-dependent uses, activating Commonwealth tidelands for public use, being consistent with the policies of the CZM Program, and, where applicable, complying with the special standards governing infrastructure facilities. 310 CMR 9.31(2)(b).

The presence of an MHP further affects the licensing process. If a nonwater-dependent project is *not* located in an area subject to an approved MHP, the project must comply with the generic standards and several qualitative criteria set forth at 9.51, 9.52 and 9.53. 310 CMR 9.31(2)(b). However, for nonwater-dependent projects that *are* located in an area subject to an approved MHP, the Waterways Regulations require DEP to apply any substitute standards in the approved MHP rather than the corresponding generic standards. 310 CMR 9.34(2)(b). Those substitute standards may include substitute numerical standards concerned with conserving and accommodating water-dependent uses (9.51 and 9.52) and activating Commonwealth tidelands for public use (9.53). As required by Section 18, all Chapter 91 licenses must be consistent with the policies of the CZM Program, which includes the review and approval of MHPs.

In addition to the quantitative dimensional elements – whether generic or harbor-specific substitutes – the regulations at 310 CMR 9.51 to 9.53 also contain several qualitative, discretionary criteria that DEP must apply in making a determination that the proposed use serves a proper public purpose. *See, e.g.*, 9.51(1), 9.52(1)(a), and 9.53(2)(a).

B. The Municipal Harbor Plan Regulations: 301 CMR 23.00.

EEA promulgated the MHP Regulations in 1990 as a component of the CZM Program. 301 CMR 23.01(1). An MHP is a planning document developed

through an extensive public process to set forth: a community's goals, objectives and policies; measures to govern public and private use of harbor waters and lands; and a planning analysis of tradeoffs and preferred courses of action. 301 CMR 23.02. A community may propose, and the Secretary may approve, harbor-specific standards in the MHP for DEP to apply in lieu of the generic standards at 310 CMR 9.51 to 9.53. These harbor specific standards, like the MHP as a whole, must "promote, with comparable or greater effectiveness, the state tidelands policy objectives stated in the corresponding provisions of 310 CMR 9.00," and "the substitute provisions may include alternative use limitations or numerical standards that are less restrictive than the Waterways requirements as applied in individual cases, provided that the MHP includes other requirements that, considering the balance of effects on an areawide basis, will mitigate, compensate, or otherwise offset adverse effects on water-related public interests." 301 CMR 23.05(2)(d).

Since adopting these regulations, the Secretary has reviewed and approved no fewer than 24 unique MHPs and MHP amendments for a remarkably diverse array of coastal municipalities and harbor areas, including Gloucester, Lynn, Boston, Provincetown, Salem and New Bedford/Fairhaven, among others.

Addendum at 181.⁴ Each of these MHPs were carefully tailored to local conditions and local land use planning objectives.

STATEMENT OF FACTS RELEVANT TO THE APPEAL

The DW MHP is the result of a five-year-long, intensive, inclusive, and thoughtful planning process. In August 2013, the City of Boston submitted a Request for a “Notice to Proceed” with the MHP process for the Downtown Waterfront District and, after a public comment period, CZM issued a Notice to Proceed on October 3, 2013. From 2013 to 2016, the City convened forty public meetings of its Downtown MHP Advisory Committee to advise the Boston Planning and Development Agency (“BPDA”) on development of the MHP. In July 2016, the City released a draft MHP for public review and comment, and the MHP was submitted to CZM and EEA on March 15, 2017. The MHP review by EEA and CZM included consultation among CZM, DEP, BPDA, and community stakeholders. The consultation period, with five extensions, ended on April 9, 2018. The final MHP was approved by the Secretary, with DEP’s concurrence, on April 30, 2018 (the “MHP Decision”). Addendum at 111-13.

The MHP Decision is based on findings that the MHP is consistent with, among other things, the Commonwealth’s tidelands policy objectives and the

⁴ For a full list of MHPs, see <https://www.mass.gov/service-details/regulatory-decisions-on-municipal-harbor-plans-and-designated-port-areas>.

associated principles in Chapter 91 and the Waterways Regulations. As stated in the Decision:

The [MHP] defines six goals which will be advanced through improvements within the study area and proposes substitute provisions to specific Chapter 91 standards along with offsetting measures for two specific sites within the planning area that are slated for redevelopment: the Harbor Garage site and the Hook Wharf site along with an area-wide substitution related to climate resilience measures.

Id. at 111.

The MHP Decision makes clear that while the DW MHP includes guidance and substitutions for some generic limitations and standards stated in the Waterways Regulations, “DEP will review any specific project proposals submitted for licensure in accordance with all applicable regulations and standards, consistent with its Chapter 91 authority.” *Id.* at 124.

In DEP’s concurrence letter, DEP recommended approval of the DW MHP, noting that “[DEP]’s staff has worked closely with the Massachusetts Office of Coastal Zone Management (CZM) and representatives of the City of Boston throughout the planning process and *our comments have been addressed and incorporated into the [DW MHP].*” Addendum at 167 (emphasis supplied). DEP expressly found that the substitutions and offsets of the DW MHP “will adequately

meet or exceed the protected interests pursuant to the Waterways Regulations.” *Id.* at 167.⁵

STATEMENT OF THE ISSUES OF LAW RAISED BY THE APPEAL

1. Did the Superior Court err in concluding that DEP exceeded its authority under Chapter 91 by adopting provisions in the Waterways Regulations, 310 CMR 9.00, *et seq.*, that require DEP, when making licensing determinations for certain projects in areas subject to a municipal harbor plan, to apply standards specific to that harbor area that have been approved by the Secretary under the MHP Regulations, 301 CMR 23.00, *et seq.*?

2. Did the Superior Court correctly find that CLF lacks standing to challenge the Downtown Waterfront MHP, where the MHP establishes applicable planning standards while leaving to DEP’s discretion the authorization for any specific project or use of tidelands within the Downtown Waterfront District?

⁵ While the particular substitutions and offsets are not germane to this application for direct appellate review, they are as follows: the approved MHP allows a maximum height of 600 feet for the Harbor Garage site instead of the generic standard of 155 feet, a maximum height of 305 feet for the so-called Hook Wharf site instead of the generic standard of 55 feet, and a building lot coverage standard of 70% for the Hook Wharf site instead of the generic standard of 50%. The MHP Decision includes offsetting measures for these substitute provisions, requiring that project proponents contribute, among other things, substantial funding for future waterfront improvement projects across the area covered by the DW MHP. Addendum at 152-54.

Both issues were raised, properly preserved in the lower court, and reported to the Appeals Court pursuant to Rule 64, Mass. R. Civ. P.

BRIEF STATEMENT OF THE STATE DEFENDANTS' ARGUMENT

I. DEP Has Authority Under Chapter 91 To Apply Secretary-Approved Harbor-Specific Standards Developed In The MHP Planning Process When Making Chapter 91 License Determinations For Projects Within The Pertinent Waterfront Area.

The Superior Court ruled that the provisions of the Waterways Regulations that require DEP to apply Secretary-approved standards that have been developed for a specific harbor area through the MHP planning process rather than the baseline standards in DEP's regulations, are *ultra vires*. The Superior Court reasoned that DEP's reliance on these harbor-specific standards impermissibly "delegates" to EEA DEP's "core" licensing power that Chapter 91 reserves for DEP alone. Addendum at 104-05. This was error.

A. The Provisions In The Waterways Regulations Requiring DEP To Apply Substitute Harbor-Specific Standards Are A Proper Exercise Of DEP's Broad Authority To Adopt Regulations Under Chapter 91.

It is entirely consistent with DEP's authority and responsibility to protect and preserve the public's rights in tidelands for DEP, when making licensing determinations under c. 91, § 18, to apply harbor-specific standards approved by the Secretary and derived during the planning process conducted under the MHP Regulations. Nowhere does Chapter 91 bar DEP from using Secretary-approved

harbor-specific standards. Indeed, the statute does not require DEP to adopt *any* standards for determining whether a particular use of tidelands “serve[s] a proper public purpose.” G.L. c. 91, § 18. The Legislature certainly could have included specific dimensional standards – such as footprint, setback or height standards – in determining whether a project serves a proper public purpose. Instead, the Legislature left the design of the regulatory scheme – including whether to use any such standards and, if so, what those standards should be – to DEP’s discretion. And “[DEP] has ‘a wide range of discretion in establishing the parameters of its authority pursuant to the enabling legislation.’” *Moot v. Department of Env’tl. Protection*, 446 Mass. 340, 346 (2007) (quot. omitted).

After many years of making licensing determinations on a case-by-case basis, beginning in 1990 DEP exercised its authority to craft regulations with one set of standards of general applicability, and another set of standards for municipal waterfront areas that are derived from an extensive planning process overseen by CZM, which has deep expertise in coastal planning. DEP’s adoption of regulations that incorporate into its licensing process the harbor-specific standards of MHPs, which have been approved by the Secretary with the involvement of CZM and DEP, is *how* DEP *chose to exercise* its authority and responsibility to “preserve and protect” the public’s interest in tidelands. G.L. c. 91, § 2. It is not, as the Superior Court erroneously found, an abdication or delegation of DEP’s duty.

DEP's choice was eminently reasonable. The MHP Regulations bar the Secretary from approving an MHP without express determining that the MHP is "consistent with state tidelands policy objectives and associated regulatory principles, as set forth in [the Waterways Regulations]," and that the substitute standards "will promote, with comparable or greater effectiveness, the state tidelands policy objectives stated in the corresponding provisions of [the Waterways Regulations]." 301 CMR 23.05(2). The MHP Regulations also condition the Secretary's approval on a series of more specific determinations that an MHP's substitute standards are consistent with particular requirements of the Waterways Regulations, including that the MHP will –

preserve any rights held by the Commonwealth in trust for the public to use tidelands for lawful purposes, and [] preserve any public rights of access that are associated with such use, as provided in 310 CMR 9.35 [];

...

ensure that nonwater-dependent use projects do not unreasonably diminish the capacity of any tidelands to accommodate water-dependent use, as provided in 310 CMR 9.51 [];

ensure that nonwater-dependent use projects on any tidelands devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in said lands, as provided in 310 CMR 9.52 []; and

ensure that nonwater-dependent use projects on Commonwealth tidelands, except in DPAs, promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and that ensures that private advantages of use are not primary but merely

incidental to the achievement of public purposes, as provided in 310 CMR 9.53 [].

301 CMR 23.05(2), (8)-(10).

In sum, DEP's approach is reasonably and rationally related to Chapter 91's goals of preserving and protecting the public's rights in tidelands. And "so long as the regulation is rationally related to [the statute's] goals," a court may not "substitute [its] judgement" for that of the agency. *Entergy Nuclear Generation Co. v. Department of Env'tl. Protection*, 459 Mass. 319, 331-32 (2011) (quot. omitted).

B. As The Executive Designated By The Legislature As "The Administrator Of Tidelands," And As The Head of the Commonwealth's Primary Environmental Planning Agency, The Secretary Is Authorized To Approve The Harbor-Specific Standards For Nonwater-Dependent Projects Used By DEP In Making Licensing Determinations In Areas Subject To An MHP.

The Superior Court found that the Secretary "is not authorized by the Legislature to make substitute proper public purpose and public benefit determinations for use in [DEP]'s licensing of tidelands projects," and on that basis struck down the Secretary-approved harbor specific standards of the DW MHP. *See Addendum*, at 105. This, too, was error.

To begin with, Secretary-approved harbor specific standards within an MHP planning area are *not* "substitute proper public purpose and public benefit determinations." The Superior Court's mischaracterization conflated two different

decisions, by equating the Secretary's approval of harbor-specific *standards* for licensing determinations with DEP's subsequent *licensing determinations* that use those substitute standards, among other factors. Nowhere in the Secretary's approval of the DW MHP did she make a determination that any particular project "serves a proper public purpose." That determination is not made until a license application is considered by DEP: the Waterways Regulations explicitly require DEP to "issue a written determination" that includes "a statement of whether the project serves a proper public purpose." 310 CMR 9.14. Indeed, the DW MHP Decision expressly provides that, "DEP will review any specific project proposals submitted for licensure in accordance with all applicable regulations and standards, consistent with its Chapter 91 authority." Addendum at 124.

It lies well within the authority given to the Secretary by the Legislature to make findings regarding harbor-specific planning standards for uses of tidelands. The Legislature has made the Secretary "*the* administrator of tidelands." G.L. c. 91, § 18B (emphasis supplied). Furthermore, the Legislature has authorized the executive office that the Secretary leads, EEA, to act as "the primary agency of the commonwealth for environmental planning." G.L. c. 21A, § 2(30). In brief, municipal harbor plans reflect environmental planning choices that have been approved by the executive officer having the ultimate authority for the administration of tidelands and environmental planning.

The Legislature has further assigned to the Secretary, in c. 21A, § 4, “the following powers and duties concerning *any power or duty* assigned to *any such department, division or other administrative unit*:”

(2) the power and duty to implement, upon request of any such agency or officer, programs jointly agreed to by the secretary and such agency or officer, [and]

(3) the power and duty to coordinate and improve program activities involving two or more such agencies or officers.

G.L. c. 21A, § 4 (emphasis supplied). Pursuant to these powers, EEA, DEP and CZM have established the integrated regulatory framework by which CZM, with input from DEP, conducts the planning process for MHPs which are approved by the Secretary, and DEP then makes individual licensing determinations for particular proposed uses of tidelands within areas that are subject to an MHP.⁶

Additionally, when the Legislature assigned Chapter 91 responsibilities to DEP, it did not do so in a vacuum. The Legislature acted knowing full well that DEP was a department within the Executive Office, subject to the supervision of

⁶ The Superior Court decision ignores several aspects of the Secretary’s powers that further underscore the lawfulness of the regulatory framework: the Legislature has designated the Secretary “the administrator of tidelands;” the Legislature has also provided that the Secretary is the appointing authority of the Commissioner of DEP; pursuant to statute, the Secretary is expected to coordinate and oversee DEP and the other departments under the Secretary’s control. *See* G.L. c. 21A, §§ 3, 4, 7. Moreover, the Secretary is a key member of the Governor’s cabinet and executive branch responsible for executing energy and environmental policy. *See* G.L. c. 6A, § 4; c. 21A, § 2.

the Secretary, and the Secretary's broad authority to coordinate all of DEP's activities and programs with the other departments and offices within the Executive Office. *See* G.L. c. 21A, § 4.

C. DEP Has Not Improperly Delegated Its Chapter 91, § 18 Licensing Authority To EEA.

The Superior Court found that DEP had impermissibly “delegated” its core licensing authority to EEA, by adopting regulations that require DEP to use harbor-specific standards developed in the MHP process when making Chapter 91 license determinations for nonwater-dependent projects. This, too, was error. At bottom, the Superior Court failed to appreciate the distinction between the approval of the planning standards that shall apply to a particular municipal harbor area and the subsequent licensing of specific uses within that harbor area.

There has been no delegation of DEP's licensing authority. The approval of an MHP by the Secretary does not license any particular use of tidelands. Specific uses of filled tidelands subject to an MHP still need to obtain a Chapter 91 license, and, for purposes of issuing a license for a nonwater-dependent use, it is DEP – and not the Secretary – that must make the requisite determination that the project serves a proper public purpose in which the probable benefits outweigh the detriments. *See* 310 CMR 9.14.

The fact that DEP has chosen to guide its license determinations, in part, by standards set by the Secretary following a planning process in which DEP provides

significant input does not equate to DEP “relinquishing” its licensing authority to the Secretary. Rather, it reflects a proper exercise of the authority given to DEP under Chapter 91, § 18, in a manner that is rationally related to the purposes of Chapter 91.

II. The Superior Court Correctly Dismissed CLF’s Challenge To The Secretary’s Approval Of The DW MHP, Because CLF Lacks Standing To Make Such A Challenge.

The Superior Court granted the State Defendants’ Motion to Dismiss CLF’s challenges to the Secretary’s approval of the DW MHP, on the grounds that CLF lacks standing to challenge that approval. The Superior Court was correct in this regard. Under *Hertz v. Secretary of Exec. Office of Energy & Env’tl. Affairs*, 73 Mass. App. Ct. 770 (2009), as well as this Court’s decision in *Enos v. Secretary of Env’tl. Affairs*, 432 Mass. 132 (2000), CLF lacks standing to challenge the DW MHP. The DW MHP is a planning document, not a licensing determination, and as such, it cannot support any claim of specific aggrievement to CLF.⁷

WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review is appropriate where an appeal presents (1) questions of first impression or novel questions of law, (2) state or federal constitutional questions, or (3) questions of substantial public interest. *See* Rule 11(a), Mass. R.

⁷ While this second issue on its own would not warrant direct appellate review, the issue was reported to the Appeals Court in tandem with the first issue and should be decided at the same time for reasons of judicial economy.

App. P. The first issue reported to the Appeals Court merits direct appellate review by the SJC under the first and third of these criteria.

The issue of whether DEP exceeded its authority by adopting Waterways Regulations that require it to apply MHP planning standards when it makes Chapter 91 licensing determinations for projects in MHP areas is a question of first impression. Neither the SJC nor the Appeals Court has addressed whether DEP is authorized, when making licensing determinations for projects subject to an MHP, to apply the Secretary-approved, harbor-specific substitute provisions of the MHP, which have been developed through the extensive public process governed by CZM regulation, rather than the generic standards from the Waterways Regulations.

Furthermore, the validity of the regulatory scheme under which municipal harbor plans are integrated into the review of specific applications for Chapter 91 licenses is a matter of substantial public interest. The public's interest in this area is at least fourfold: *First*, there are 17 existing municipal harbor plans in effect in 12 communities, and the Superior Court's decision calls into question the validity of over 50 Chapter 91 licenses for existing nonwater-dependent projects issued using the substitute provisions of those 17 MHPs, necessarily clouding the title for those projects unless and until the validity of those licenses is reconfirmed. *Second*, there are pending applications for Chapter 91 licenses for projects developed in reliance

on the substitute provisions in existing MHP districts, as well as developments currently underway that have been designed and are being developed in reliance on the existing harbor plans. *Third*, the public has a significant interest in determining the legitimacy of a thirty-year-old regulatory scheme carefully designed and calibrated, under EEA, to protect the public's interests in tidelands, while being responsive to specific local conditions and local land use planning priorities and objectives. *Finally*, the Superior Court's decision undermines the current structure of state government and usurps the ability of the Governor to arrange and order executive agencies for maximum effectiveness.

For all these reasons, the State Defendants petition this Court to grant direct appellate review of the issues reported.⁸

⁸ Following the Superior Court's decision calling into question DEP's authority to rely on Secretary-approved harbor specific standards when making licensing determinations for uses of tidelands in an MHP area, and solely as a precautionary measure, DEP published for public comment draft regulations that would resolve the Superior Court's concern about the existing regulations. As of the date of this application, those regulations remain in draft form and no decision has been made to proceed further with enacting them. By prosecuting this appeal, and petitioning for direct appellate review, EEA and DEP are signaling their strong policy preference to keep the current regulatory scheme in place. Moreover, even were the draft regulations finalized in their current form, they would not moot the serious issue of public concern presented by this application.

Respectfully submitted,

KATHLEEN THEOHARIDES and
MARTIN SUUBERG

By their attorneys,

Maura Healy, *Attorney General*

/s/ Kate R. Cook

Kate R. Cook (BBO# 650698)

cook@sugarmanrogers.com

Special Attorney General

C. Dylan Sanders (BBO# 630668)

sanders@sugarmanrogers.com

Lisa C. Goodheart (BBO# 552755)

goodheart@sugarmanrogers.com

Alessandra Wingerter (BBO# 698391)

wingerter@sugarmanrogers.com

SUGARMAN, ROGERS, BARSHAK
& COHEN, P.C.

101 Merrimac Street, Suite 900

Boston, MA 02114

(617) 227-3030

September 30, 2021

CERTIFICATE OF COMPLIANCE

I, Dylan Sanders, hereby certify, under the penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and addendums, including, but not limited to Rule 11(b) (applications for direct appellate review).

This brief was written in Times New Roman, 14-point proportional font, and created on Microsoft Word (v. 2021). The number of non-excludable words contained in the “Brief Statement of the State Defendants’ Argument” is **1861**, and less than the 2000-word limit permitted by Rule 11(b), Mass. R. App. P. The undersigned has relied upon the word count feature of the software to calculate the word count.

/s/ Dylan Sanders

Dylan Sanders

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I hereby certify under the penalties of perjury, that on September 30, 2021, I have made service of this Application for Direct Appellate Review through the Electronic Filing System on counsel of record for all parties, as well service by electronic mail.

/s/ Dylan Sanders

Dylan Sanders

ADDENDUM

Copy of Docket Entries in <i>Armstrong, et al. v. Kathleen Theoharides, et al.</i> , Suffolk Superior Court Civil Action No. 11884-CV-02132-BLS1	Addendum 1
Copy of Docket Entries in <i>CLF, et al. v. Kathleen Theoharides, et al.</i> , Suffolk Superior Court Civil Action No. 11884-CV-02144-BLS1	Addendum 28
Memorandum of Decision and Order on Defendants' Motion to Dismiss	Addendum 40
Memorandum of Decision and Order on Cross-Motions for Summary Judgment	Addendum 77
Decision and Order Regarding State Defendants' Motion to Report the Ruling on Count IX to the Appeals Court and to Stay Proceedings on Count X (Docket Entry No. 48 in 11884-CV-02132-BLS1) and Joint Motion to Report the Rulings on Count I and Count II to the Appeals Court and to Stay the Remainder of the Case (Docket Entry No. 31 in Civil Action 11884-CV-02144-BLS1)	Addendum 106
Decision on the City of Boston's Request for Approval of the Downtown Waterfront District Municipal Harbor Plan Pursuant to 301 CMR 23.00 (April 30, 2018)	Addendum 110
DEP Recommendation for the Approval of the City of Boston's Downtown Waterfront District Municipal Harbor Plan (April 30, 2018)	Addendum 167
Consolidated Statement of Material Facts Relating to the Parties Cross-Motions for Partial Summary Judgment on Count One of the Amended Complaint (from <i>Conservation Law Foundation, et al. v. Kathleen Theoharides, et al.</i>	Addendum 169
Affidavit of Ben Lynch (April 16, 2020)	Addendum 180